EDITOR'S NOTE

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87-5428

IN THE SUPREME COURT
FOR THE UNITED STATES OF AMERICA

PRENTISS HOUSTON	:	
Petitioner	:	
vs.	:	Case No. _____
LARRY LACK, Warden	:	
Respondent	:	

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, by and through his attorney of record, Penny J. White, a member of the bar of the state of Tennessee, who was appointed by order of the Sixth Circuit United States Court of Appeals, respectfully moves this Honorable Court to allow this Petition for Writ of Certiorari to be filed without payment of fees.

The Petitioner appends hereto the order of the Sixth Circuit Court of Appeals appointing counsel, PURSUANT TO CRIMINAL JUSTICE ACT, 1964.

Respectfully Submitted,

Penny J. White

PENNY J. WHITE
Attorney at Law
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CASE NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

October 1986 Term

PRENTISS HOUSTON	:
Petitioner	:
vs.	:
LARRY LACK	:
Respondent	:

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Submitted By:

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QUESTION PRESENTED FOR REVIEW

Does a United States Court of Appeals have jurisdiction to hear an appeal from the denial of a state prisoner's pro se application for writ of habeas corpus when the notice of appeal is delivered to prison authorities for mailing three days prior to the due date but arrives at the clerk's office one day after the deadline provided by Rule 4(a) of the Federal Rules of Appellate Procedure?

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PRIOR OPINIONS

The opinions of the District Court and Court of Appeals are appended are exhibits 1 and 2.

The decision of the United States District Court for the Western District of Tennessee is reported at 635 F. Supp. 786 (W.D. Tenn. 1986). The decision of the Sixth Circuit Court of Appeals has not been published.

STATEMENT OF JURISDICTIONAL GROUNDS

This petition for writ of certiorari seeks the review of the dismissal by the Sixth Circuit Court of Appeals of Petitioner's application for writ of habeas corpus. The petition is sought pursuant to 28 U.S.C. 1254. The Sixth Circuit dismissed the application for writ of habeas corpus by order dated May 22, 1987, appended as exhibit 2. A Petition for rehearing en banc was filed but was denied by the court by order dated July 10, 1987, appended as exhibit 3.

RELEVANT STATUTE AND RULES

28 U.S.C. Section 2253

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

. . .

Federal Rules of Appellate Procedure, Rule 3(a)

Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . .

Federal Rules of Appellate Procedure, Rule 4(a)(1) & (5)

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

. . .

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before the expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

. . .

STATEMENT OF THE CASE

Petitioner was charged with the offense of first degree murder by indictment of the Obion County, Tennessee grand jury on October 11, 1982. On November 15, 1982, petitioner, after being informed that the State would seek the death penalty, entered a guilty plea to the charge of second degree murder and received a fifty year sentence as a range two offender under Tennessee law. Petitioner was not eligible for the death penalty at that time under this Court's holding in Enmund v. Florida, 458 U.S. 92 (1982).

As a result of his plea, petitioner was sentenced under the Tennessee Class X felony law but neither the judge nor his counsel explained to him the nature of the conviction or the serious consequences of his plea. Following the exhaustion of his state remedies, petitioner filed a pro se application for writ of habeas corpus with the United States District Court for the Western District of Tennessee pursuant to 28 U.S.C. Section 2254. The Western District neither appointed counsel nor conducted an evidentiary hearing but dismissed petitioner's petition by written opinion on January 6, 1986. The judgment dismissing the petition was filed on January 7, 1986. On February 3, 1986, petitioner, still proceeding pro se, drafted and presented to his custodians for filing a notice of appeal. The Notice of Appeal was marked "filed" by the District Court on February 7, 1986, one day beyond the thirty day filing period as set forth in Rule 4(a)(1) of the Federal Rules of Appellate P--cedure. Petitioner was never notified that his notice was received late so he never filed a motion for an extension of time as allowed by Federal Rules of Appellate Procedure 4(a)(5).

On February 15, 1986, a certificate of probable cause was filed by the district judge which noted that the

substantive issue presented in petitioner's application was "a question of first impression" in the jurisdiction. On March 5, 1986, the court of appeals circulated a briefing schedule which was received by the pro se petitioner. It was not until March 21, 1986, thirteen days after the time had expired for petitioner to seek an extension of time, that the petitioner was first notified on the untimeliness of his notice of appeal. Petitioner urged the Court of Appeals to reconsider his case in light of this Court's opinion in Fallen v. United States, 378 U.S. 139 (1964). Based on this procedural technicality, the Court of Appeals for the Sixth Circuit refused to reach the merits of petitioner's claim.

ARGUMENT

I. This petition for writ of certiorari should be granted because of the present conflict which exists between the courts of appeals regarding the issue of excuseable neglect in pro se appeals.

One of the reasons that this Court may accept a case upon petition for writ of certiorari exists when "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." U.S. Sup. Ct. R., Rule 17.1(a). In the case before the bar that is precisely the situation. The Sixth Circuit Court of Appeals dismissed petitioner's appeal frm a denial of his application for a writ of habeas corpus by invoking a rule of strict compliance with Rule 4(a) of the Federal Rules of Appellate Procedure. In a previous decision, the Sixth Circuit had noted the approach of the Tenth Circuit which treated notices of appeal filed within the time set forth in the rule for excusable neglect petitions as motions for extension of time. The Sixth Circuit opted not to follow the approach it had recommended in its earlier decision and consequently deprived petitioner of a hearing on the merits of his constitutional claims.

Prior to the 1979 amendments to Rule 4(a)(5) of the Federal Rules of Appellate Procedure, an untimley filed notice of appeal filed by a pro se litigant within sufficient time to allow the district court to extend the time upon a showing of excusable neglect, entitled the litigant to an opportunity to justify his delay in accordance with the rule. United States v. Lucas, 597 F.2d 243 (10th Cir. 1979); Moorer v. Griffin, 575 F.2d 87 (6th Cir. 1978); United States v. Shillingford, 568 F.2d 1106 (5th Cir. 1978); Craig v. Garrison, 549 F.2d 306 (4th Cir. 1977). The 1979 amendment changed the language of the

excusable neglect extension provision by requiring that the motion requesting an extension be "filed not later than 30 days after the expiration of the time prescribed by Rule 4(a)." Fed. R. App. P. 4(a)(5). Although some courts continued to give the rule the prior interpretation in applying it to pro se litigants, Shah v. Hutto, 704 F.2d 717, 721 (4th Cir. 1983), rev'd on rehearing, 722 F.2d 1167 (4th Cir.1983)(applying the rule with "elasticity" in regard to pro se litigants in light of admonition to be "liberal and flexible in our application and interpretation of Rules 3 and 4"), others have applied the rule rigidly as written even in cases where the equities suggest otherwise, Pryor v. Marshall, 711 F.2d 63 (6th Cir. 1983).

When faced with the issue of applying the 1979 amendments to pro se litigants, the Tenth Circuit in their opinion in United States v. Lucas, 597 F.2d 243 (10th Cir. 1979) saw the inequities which existed for pro se litigants and grappled with the problem that occurs when the pro se petitioner is not notified of his techinical noncompliance until it is too late to remedy the problem by filing a motin for extension: "It would be most helpful if the district court would advise a would-be appellant, and particularly one who is pro se, that his notice of appeal is untimely, thereby putting him on notice that some immediate action is yet required to secure appellate jurisdiction." Id. at 245. Similarly, the Second Circuit has allowed an appeal when the habeas corpus petitioner did not file his notice within the original thirty-days but did so within the excusable neglect extension period. Moore v. Nelson, 611 F.2d 434 (2nd Cir. 1979). See Shah v. Hutto, 704 F.2d 717 (4th Cir. 1983), rev'd, 722 F.2d 1167 (4th Cir. 1983), cert. denied, 466 U.S. 975 (1984)(first holding that the rules must be applied with "elasticity" to pro se litigants, then reversing itself on rehearing).

Although the Sixth Circuit Court of Appeals specifically noted the value of the Tenth Circuit approach as it applies to pro se litigants, Pryor v. Marshall, 711 F.2d 63, n.4 (6th Cir. 1983)(quoting United States v. Lucas, 597 F.2d 243, 245 (10th Cir. 1979)), it rejected the holding and held instead that a late-filed notice of appeal is not a substitute for filing a motion for extension of time under Rule 4(a)(5) and that such a motion must be filed before the expiration of the extension period. Id.; Houston v. Lack, No. 86-5198 Order (May 22, 1987). The First, Fifth, Seventh, and Eighth Circuits seem to concur with the Sixth in disallowing the appeal under such circumstances, although some of these decisions did not squarely face the issue in the pro se context. United States ex rel. Leonard v. O'Leary, 788 F.2d 1238 (7th Cir. 1986); Williams v. Armontrout, 777 F.2d 422 (8th Cir. 1985); Wyzik v. Employee Ben. Plan of Crane County, 663 F.2d 348 (1st Cir. 1981); Barksdale v. Blackburn, 657 F.2d 630 (5th Cir. 1981).

Since petitioner's right to appeal would have been protected by due process had he been appointed counsel, 28 U.S.C. Section 2253; Evitts v. Lucey, 469 U.S. 387 (1985), an equal system of justice cannot allow him to be totally deprived of an appeal because the district court judge did not appoint counsel. U.S. Const. amend. XIV. This approach was suggested by the commentators to the rules which suggest dispensing with rigid application of the rules when to so apply the rules would prohibit them from "exacting fairness". Notes of Advisory Committee on Appellate Rules, General Note, Rule 3. If the approach of the Tenth and Second Circuits cannot be judicially mandated, then at a minimum, the Court should require the federal court clerks to notify pro se litigants when their notice of appeal is untimely so that a motion for extension based upon excusable neglect can quickly be filed.

Petitioner was never advised of his technical noncompliance with Rule 4 until after the period for requesting an extension had expired. All of the court's actions indicated that the appeal was properly filed: the acceptance of the probable cause statement, the notification of briefing schedules. If the rules are to "exact fairness" the pro se litigant must be notified prior to the expiration of the extension time that his notice of appeal was untimely. Notes of Advisory Committee on Appellate Rules, General Note, Rule 3 ("decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules.")(citing Coppedge v. United States, 369 U.S. 438, 442 n.5 (1962); Fallen v. United States, 378 U.S. 139 (1964).

II. This petition for writ of certiorari should be granted to settle a question of federal law or to correct the Sixth Circuit's apparent disregard of Supreme Court precedent.

In the 1964 decision of Fallen v. United States, 378 U.S. 139 (1964), this Court held that "the rules are not, and were not intended to be, a rigid Code to have an inflexible meaning irrespective of circumstances." 378 U.S. at 142. Mr. Fallen, a pro se defendant, had given a letter asking for a new trial and appeal from his criminal conviction to the prison officials to be mailed to the appropriate court clerk. Although the notice left the prison in time to arrive before the due date, the petitioner did not accomplish filing within the time allowed by the rules. Finding that the prisoner had done "all that could reasonably be expected" the Court allowed the appeal declining to "read the Rules so rigidly as to bar a

determination of his appeal on the merits. While it is true that the Court referred specificially to the cautionary admonition in Rule 2 of the Federal Rules of Criminal Procedure and to the inherent appellate right of criminal defendants from their convictions, this distinction is not definitive as is revealed by the general reliance upon this case for the proposition that the rules should be applied elastically by the committee commentators. See Notes of Advisory Committee on Appellate Rules, General Note, Rule 3.

This Court's recognition in Fallen that an inmate, because of his confinement, is oftentimes rendered helpless in his attempt to comply with the procedural technicalities should not be disregarded. Other courts have noted the importance of this finding in similar circumstances. Williams v. United States, 188 F.2d 41 (D.C.Cir. 1951); Wallace v. United States, 174 F.2d 112, 114 (8th Cir. 1949); Remine v. United States, 161 F.2d 1020 (6th Cir. 1947). See Coppedge v. United States, 369 U.S. 438, 442 n.5 (1962)(cases cited therein); Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964); Riffle v. United States, 299 F.2d 802 (5th Cir. 1962). Perhaps this Court's Fallen concurrence hit upon the answer when they suggested that in these circumstances, the jailer acts as the court clerk. "To hold [otherwise] would give [the] jailer power to prevent an appeal." Oddo v. United States, 171 F.2d 854, 855 (2d Cir. 1949). See Hill v. Hawes, 320 U.S. 520 (1944).

In addition to viewing whether, under the circumstances, petitioner did all that he could do, courts have viewed the petitioner's detrimental reliance on a reliable source as a grounds for validating a late appeal. Warren v. United States, 358 F.2d 527, 530 (D.C. Cir. 1965)(where detrimentally relied upon prison officials to mail promptly and delay was not attributable to prisoner, appeal should be heard on merits); see Sanchez v. Board of

Regents of Texas Southern University, 625 F.2d 521 (5th Cir. 1980)("[r]eliance on the normal course of delivery of mail is reasonable and may be the basis for a court to excuse otherwise timely filing"); see also Dowd v. Cook, 340 U.S. 206 (1951); Cochran v. Kansas, 316 U.S. 255 (1942). In this case petitioner deterimentally and justifiably relied upon his custodians to promptly mail his notice of appeal; he was further induced in his reliance by his receipt of the certificate of probable cause and the appellate court briefing schedule. Absolutely nothing happened to alert him to the untimeliness of the filing until it was too late to remedy the situation. Yet the Sixth Circuit's order dismissing the appeal for untimely filing has deprived petitioner of having the substantive constitutional merits of his habeas corpus appeal heard. Had the petitioner only lived elsewhere, his appeal might have been deemed timely. Obvious differences in the application of federal law creates an unjust and unfair disadvantage for litigants dependent on their place of residence. Such distinctions should not be tolerated in a land that boasts of "equal justice for all."

C O N C L U S I O N

As this Court has duly noted, the "overriding responsibility [of the Courts] is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. . . . Chessman v. Teets, 354 U.S. 156, 165 (1957). The extreme constitutional importance of this habeas corpus application was noted by the district judge in his certificate of probable cause. The clear policy of the law requires courts to reach the merits of the issues since to do otherwise would "defeat the interests of justice." Blunt v. United States, 244 F.2d 355, 361 (D.C. Cir. 1957).

> We must be deaf to all suggestions that a valid appeal to the Constitution, . . . comes too late, because courts were not able earlier to enforce what the Constitution demands. . . . The proponent before the Court is not the petitioner but the the Constitution of the United States.

Chessman v. Teets, 354 U.S. 156, 165 (1957). For all these reasons petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari and remand this case to the Sixth Circuit Court of Appeals for a determination of the merits of petitioner's case.

Respectfully Submitted,

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APPENDIX

Opinion of the United States District Court for the Western District of Tennessee Eastern Division 14a

Opinion of the Sixth Circuit Court of Appeals 14b

Order of the Sixth Circuit Court of Appeals denying Petition for Rehearing En Banc 14c

Order of the Sixth Circuit appointing Counsel 14d

FILED JAN 8 1986 CLERK, U. S. DIST. COURT MIDDLE DIST. OF TENN.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

PRENTISS L. HOUSTON,
Petitioner,

VS. No. 85-1086

LARRY LACK, Warden,
Respondent.

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

This petition for writ of habeas corpus was filed on May 15, 1985, by petitioner Prentiss L. Houston, who alleges that his Tennessee state court conviction is unconstitutional because it is based upon an involuntary guilty plea. Petitioner alleged that the plea was not voluntarily entered because (1) the state court judge failed to fully and adequately inform him of the nature of the charge against him and the consequences of a guilty plea and (2) his court appointed counsel did not render effective assistance, thereby depriving him of his due process rights. For the reasons set forth below, both of these contentions are found to be without merit and the petition is dismissed.

I. PROCEDURAL BACKGROUND AND FACTS.

After filing his answer to the petition, respondent was directed by this Court to file a copy of the transcript of petitioner's state court proceedings. The transcript indicates that petitioner brought a state habeas corpus petition following his conviction, alleging the same grounds as now presented. A

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full evidentiary hearing was conducted by the state court on that petition. Petitioner was represented at that hearing by different counsel than in his trial court proceedings and both petitioner and his court-appointed counsel from the trial court proceedings testified. Based upon the findings of fact at the hearing and the applicable law, petitioner's state habeas corpus petition was denied.

Although this Court is not bound by the state court's findings of fact, such findings are entitled to a presumption of correctness. Martin v. Foltz, 773 F.2d 711, 716 (6th Cir. 1985).[1] Petitioner has not alleged that those findings are incorrect and, in fact, presents only questions of law to this Court in his petition. Furthermore, this Court finds that another evidentiary hearing would not shed any additional light on petitioner's claims and is not required by 28 U.S.C. § 2254(d). Accordingly, a ruling on this petition will be made on the basis of the pleadings of the parties and the state court transcript. See Rule 8(a), Rules Governing § 2254 Proceedings, 28 U.S.C. foll. § 2254.

According to his own statement of the facts, petitioner and a co-defendant were indicted for first degree murder by the Obion County, Tennessee Grand Jury on October 11, 1982. Prior to the indictment, Messrs. Thomas L. Rogers and James M. Glasgow, Jr. were appointed to represent the two defendants. Initially, the

[1] See also Strickland v. Washington, 466 U.S. 468, 104 S.Ct. 2052, 2070 (1984) (noting that state court findings of fact are entitled to deference but that a claim of ineffectiveness of counsel presents mixed questions of law and fact).

attorneys planned to jointly represent both defendants, with Mr. Rogers conducting the bulk of the factual investigation and Mr. Glasgow researching the legal issues presented. Following the indictments, however, the trial court appointed Mr. Glasgow to represent petitioner and Mr. Rogers to represent his co-defendant. Although each defendant had separate counsel at that time, the record indicates that the two attorneys continued to work together, sharing both factual and legal information regarding the defense of their clients. Pre-trial motions for discovery and for psychiatric evaluation were made on behalf of petitioner by Mr. Glasgow. Mr. Rogers made motions for a change of venue, in limine, to exclude evidence, for discovery, for a non-jury trial, and to set aside the indictment against his client.

Sometime following petitioner's indictment and before the entry of his guilty plea, the state prosecutor communicated a plea bargain offer to the attorneys, in which the state would agree to allow the two defendants to plead guilty to second degree murder, as Range II offenders under Tennessee law, with 50 year sentences. Petitioner alleged that at no time during discussions of that offer did Mr. Glasgow inform him of the consequences of entering the guilty plea, specifically that he would be pleading guilty to a Class X felony and would be subject to the requirements for Class X felons.[2] Furthermore, petitioner alleged that on November 15, 1982, the date he entered his guilty plea, the trial court judge also failed to fully and adequately inform him of the nature of the plea and its attendant

[2] See Tenn. Code Ann. § 39-1-703 (1982).

consequences. According to petitioner, it was not until he was incarcerated at the Tennessee State Penitentiary that he learned that, as a Class X felon, he was ineligible for work release, trusteeship status, furloughs, educational or recreational release, credit for good behavior, or any other program that would operate to reduce his sentence or place him in supervised or unsupervised release programs in the community.

The gravamen of petitioner's claim that his plea was not voluntarily entered is that he would not have entered the plea if he had known of the attendant consequences of being convicted of a Class X felony under Tennessee law. In his petition, he charged his court-appointed attorney and the trial judge with fault for failing to fully apprise him of those consequences. In its opinion denying petitioner state habeas corpus relief, the state court summarily dismissed this claim, stating that "A defendant does not have a constitutional right to have the effect of a sentence under the Class X felony statute explained to him." Houston v. State, No. 4556, slip op. at 8 (Cir. Ct. Obion Co. Tenn., Sept. 27, 1983) (citing State v. Wallace, 604 S.W.2d 890 (Tenn. Crim. App. 1980); State v. Hayes, No. 909 (Tenn. Crim. App. Sept. 1, 1983, Knoxville); State v. Minor, No. 123 (Tenn. Crim. App. Dec. 17, 1981, Jackson). In this petition, the only attempt by petitioner to distinguish the cases relied upon by the state court is his allegation that, in his case, neither the trial judge nor his appointed counsel understood the consequences of a Class X conviction.

II. GROUNDS FOR HABEAS CORPUS RELIEF

A. Ineffective Assistance of Counsel

As noted above, petitioner alleged that his conviction is unconstitutional because his guilty plea was not voluntary and because his court-appointed attorney rendered ineffective assistance. For the purposes of discussion, the claim of ineffective assistance of counsel will be addressed first.

Recently, the Supreme Court was presented with a case similar to that now before this Court. In Hill v. Lockhart, ___ U.S.___, 106 S.Ct. 366 (1985), the voluntariness of a guilty plea was at issue in the context of a claim of ineffective assistance of counsel. The alleged ineffectiveness of the petitioner's counsel in that case arose out of an attorney's erroneous advice to the petitioner, William Lloyd Hill, regarding the time he would have to serve under a plea bargain before being eligible for parole. According to Hill, his attorney had informed him that if he pleaded guilty he would have to serve one-third of his prison sentence before being considered for parole. However, because Hill had a prior conviction in another state, he was considered a second offender under Arkansas law and was thus required to serve one-half of his sentence before becoming eligible for parole. Because he had entered his guilty plea upon the mistaken belief that he would be eligible for parole after serving one-third of his sentence, Hill alleged that his plea was not voluntarily entered.

The trial court's denial of Hill's petition for habeas corpus relief was affirmed by a divided panel of the Eighth

Circuit Court of Appeals. 731 F.2d 568 (1984). In an en banc rehearing, an equally divided court affirmed that decision. 764 F.2d 1279 (1985). Hill's petition for a writ of certiorari was then granted by the Supreme Court. ___U.S.___, 105 S.Ct. 1745 (1985).

The Supreme Court began its analysis of Hill's challenge to the voluntariness of his guilty plea by noting that the "long standing test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" 106 S.Ct. at 369 (citing North Carolina v. Alford, 400 U.S. 25, 31 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969); Machibroda v. United States, 368 U.S. 487, 493 (1962)). Although the issue was not raised by Hill, the Court stated that neither the Constitution nor Rule 11 of the Federal Rules of Criminal Procedure required that the state give a defendant information about parole eligibility in order for a guilty plea to be voluntary. 106 S.Ct. at 369.

With regard to the voluntariness of a guilty plea and a claim of ineffective counsel, the Court stated that the two-part standard for claims of ineffective assistance of counsel adopted in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), was also applicable to challenges to guilty pleas. 106 S.Ct. at 370. That test requires that the petitioner show (1) that his attorney's "representation fell below an objective standard of reasonableness" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." Id. at 369, quoting Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068 (1984). The basis for the second part of that test, as noted by the Hill court, is that the mere existence of error on the part of a defendant's attorney does not justify setting aside a criminal judgment unless the judgment was due to the error. Id. at 370, quoting Strickland, 466 U.S. at 691, 104 S.Ct. at 2067.

Applying the Strickland test to the case before it, the Hill court found that the petitioner had failed to satisfy the second part of the test. That part requires that the criminal defendant show that his attorney's erroneous advice "prejudiced" him. To show such "prejudice," the defendant "must show that there is a reasonable probility that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 106 S.Ct. at 370. Because he failed to allege that he would not have pleaded guilty but for his attorney's erroneous advice, the Court found that Hill had not shown such prejudice. 106 S.Ct. at 371. Without such an allegation, the second part of the Strickland test was not met and it was not error for the trial court to dismiss the petition without an evidentiary hearing. Id.

Since it was able to dispose of the claim of ineffective assistance of counsel before it for failure to meet the second part of the Strickland test, the Hill court did not determine whether the attorney's erroneous advice concerning parole eligibility was constitutionally ineffective assistance. 106 S.Ct. at 371. Nevertheless, in addressing the claims presented

in this petition, this Court is guided by Hill and its holding that the Strickland test applies to claims of ineffective assistance of counsel in the context of a guilty plea.

Petitioner in this action has alleged that his court-appointed attorney was ineffective because he failed to inform petitioner of all consequences of a Class X felony conviction. No reported cases have been found holding that failure to inform a defendant of the collateral consequences of a Class X felony conviction constitutes ineffective assistance of counsel. This Court is aware, however, of at least four unreported opinions of the Tennessee Court of Criminal Apeals holding that an attorney's failure to explain the effects of a Class X felony conviction to a defendant does not constitute ineffective assistance of counsel. See State v. Reed, No. 85-127-III (Tenn. Crim. App. Nov. 8, 1985, Nashville); Pickett v. State, No. 119 (Tenn. Crim. App. Sept. 6, 1984, Jackson); State v. Hayes, supra; State v. Minor, supra. Because these opinions contain only conclusory statements on this issue, further analysis of petitioner's claim is required.

Without controlling precedent to rely upon, determination of this claim may be made only be application of Strickland's general test. According to Strickland, "the proper standard for attorney performance is that of reasonably effective assistance." 466 U.S. at 687, 104 S.Ct. at 2064. See also Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). The first prong of the Strickland test, as discussed above, addresses the attorney's performance and requires that the attorney's representation fail

to meet "an objective standard of reasonableness." 466 U.S. at 687-88, 104 S.Ct. at 2065. Although "more specific guidelines" defining that standard were said by the Strickland court to be inappropriate, the Court did set forth "certain basic duties" involved in representing a criminal defendant. 466 U.S. at ___, 104 S.Ct. at 2065. According to the Court, those duties include duties "of loyalty, ... to advocate the defendant's cause, ... to consult with the defendant on important decisions, ... to keep the defendant informed of important developments, ... [and] to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. (citations omitted). Because the list was not intended to be exhaustive or to be used as a "checklist for judicial evaluation," claims of ineffective assistance of counsel alleging the breach of some duty not listed by the Court require resort to "prevailing norms of practice," such as standards promulgated by professional organizations. Id.

Before examining the claim presented by this petitioner, it is noted that review of an attorney's performance under Strickland must be "highly deferential" and include "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at ___, 104 S.Ct. at 2065, 2066. It is only when the reviewing court, considering all the circumstances, finds that the acts or omissions complained of were outside that range that a claim of ineffective assistance of counsel has been shown and habeas corpus relief is due. 466 U.S. at ___, 104 S.Ct. at 2066.

Placing these abstract principles into the setting of a guilty plea, it appears that "reasonable professional assistance" requires that an attorney insure that his client "understood his rights, the nature of the charges and the possible sentence if convicted." Jones v. Parke, 734 F.2d 1142, 1146 (6th Cir. 1984). Although the petitioner herein may assert that his ignorance of a Class X conviction's collateral consequences vitiates any finding that he understood "the possible sentence" his plea would entail, this Court finds that knowledge of all consequences of a possible sentence is not required in order to understand that sentence. Petitioner was informed during the plea colloquy that the state intended to seek either life incarceration or the death penalty if his case went to trial and understood that he was pleading to a lesser charge with a sentence of fifty years. Furthermore, it was made clear at the plea proceedings that the petitioner would have to serve at least twenty years of his sentence. With knowledge and understanding of those terms of the plea, petitioner entered his plea. Because his client was aware of the possible sentence he faced, it cannot be said that the attorney's failure to inform petitioner of every consequence of that sentence constituted ineffective assistance of counsel.

Other courts that have reviewed claims of ineffective assistance of counsel arising out of advice given before a guilty plea have reached similar conclusions. For example, it has been held that failure to inform a defendant of the date on which he would become eligible for parole is not ineffective assistance of

counsel.[3] See e.g., Frank V. United States, 515 F. Supp. 703, 707 (E.D. Pa. 1981). See also United States v. French, 719 F.2d 387 (11th Cir.), cert. denied, ___U.S.___, 104 S.Ct. 2174 (1983) (failure to inform of "binding" plea agreement rule); United States v. Santelises, 509 F.2d 703 (2d Cir. 1975) (failure to inform of possible deportation). The Santelises case is especially persuasive as it is difficult to imagine how a failure to inform a defendant that he will not be eligible for work release or similar programs can constitute ineffective assistance of counsel when the failure to inform the defendant in Santelises that he could be deported as a result of his conviction was found not to constitute ineffective assistance of counsel.

In any case, the alleged failure to inform a defendant of a consequence of his guilty plea must be found to constitute representation below an "objective reasonable standard." As noted above, the Tennessee Court of Criminal Appeals has specifically found that failure to inform a defendant of the consequences of a Class X conviction is not ineffective assistance of counsel. Furthermore, it is evident from a reading of Tennessee Rules of Criminal Procedure 11(c) and the committee comments to the rule that a defendant need not be informed of all collateral consequences of his plea. This Court finds, therefore, that the mere failure of an attorney to inform a

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[3] However, as compared to a failure to inform (as in this petition), erroneous information may at times give rise to a finding of ineffective assistance of counsel if the defendant relied on the misinformation when entering his plea. See Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979) ("grossly misinformed").

defendant of the collateral consequences of a Class X felony conviction does not constitute ineffective assistance of counsel. Because petitioner has not alleged that his attorney failed to inform him of the direct consequences of his plea or gave him grossly incorrect advice about the collateral consequences that he relied upon in making his plea,[4] it cannot be said that any act or omission of his attorney constituted such ineffective assistance of counsel as to render his guilty plea unconstitutional.

In addition to alleging that his counsel rendered ineffective assistance by failing to advise him of all the consequences of a Class X felony conviction, petitioner also alleged that his court-appointed attorney's representation was ineffective because he (1) failed to interview all significant witnesses, (2) failed to request a severance, (3) filed only two motions, and (4) coerced a guilty plea by telling petitioner that the evidence of his guilt was overwhelming. The standard by which this Court examines these claims is the same as that just discussed, whether the representation fell below an "objective standard of reasonableness."

Petitioner alleged that his attorney failed to interview all significant witnesses, yet testified during the plea colloquy that the attorney had talked to everyone that petitioner had asked him to. Transcript (T) 84. In fact, petitioner admitted during his state habeas corpus proceedings that he had only given the attorney the name of one potential witness. Post-conviction

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[4] Compare Strader, supra n.3.

transcript (PT) at 106. In contrast, petitioner's attorney testified that he went to the scene of the crime on two occasions and spoke with eight to ten potential witnesses. PT 67-68. This testimony was uncontroverted and can only lead to a finding that Mr. Glasgow made reasonable efforts to interview potential witnesses. It is especially significant that petitioner could not name any additional witnesses at his state post-conviction hearing. PT 92. This Court is unable to find that the attorney's efforts at interviewing potential witnesses were not objectively reasonable given petitioner's inability to offer proof that any significant witnesses existed.

Petitioner also alleged that the failure to request a severance amounted to ineffective assistance of counsel. Although a severance may at times be necessary in order to avoid confusing a jury and thereby prevent multiple defendants from obtaining a fair trial, the failure to move for a severance in this case cannot be said to have had any effect since the proceedings had not yet reached a stage in which a jury was involved. Furthermore, in the event petitioner had pleaded not guilty, thereby making a jury trial necessary, Mr. Glasgow could have then moved for a severance prior to the trial.[5] His failure to so move prior to the entry of petitioner's guilty plea

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[5] This is true even if the motion date, as set by the trial judge pursuant to Rule 12(c) of the Tennessee Rules of Criminal Procedure has passed, since a continuing duty exists to grant a severance at any stage of the trial if it appears to the trial court that the defendant would be prejudiced by a joint trial. See United States v. Morgan, 394 F.2d 973 (6th Cir.), cert. denied, 393 U.S. 942 (1968).

can thus not be said to fall below an objective standard of reasonableness.

Mr. Glasgow's filing of only two pre-trial motions is said by petitioner to constitute ineffective assistance of counsel when compared to the fact that the attorney for petitioner's co-defendant filed seven motions. Mr. Glasgow explained this difference, however, by noting that if any of the additional motions filed on behalf of petitioner's co-defendant were granted, he would then have made a similar motion. PT 78. Such a strategic move by petitioner's attorney does not appear unreasonable and, in fact, appears to have been a calculated move by Mr. Glasgow to conserve the efforts of all parties involved without resulting in prejudice to his client. Accordingly, this Court finds that this strategic decision by petitioner's counsel does not constitute grounds to reverse the conviction.

Finally, petitioner alleged that his attorney coerced him into pleading guilty by telling him that the evidence against him was overwhelming. The fact that his attorney so advised petitioner cannot be found to give rise to a finding that the petitioner was deprived of the effective assistance of counsel given the investigation made by Mr. Glasgow and the attorney for petitioner's co-defendant. Again, this Court notes that petitioner provided his attorney with the name of only one witness. After two trips to the scene of the crime and interviews with eight to ten potential witnesses, Mr. Glasgow's belief that it would be in petitioner's best interests to accept a plea bargain does not appear to be unreasonable. Even if his

attitude was perceived by petitioner as being pessimistic, pessimism alone does not constitute ineffective assistance of counsel. See United States v. Rogers, 769 F.2d 1418, 1424 (9th Cir. 1985). Accordingly, this Court finds no evidence to support petitioner's allegation that his guilty plea was coerced by his attorney's advice that the evidence against him was overwhelming.

B. Voluntariness of the Guilty Plea

As noted above, petitioner also alleged that his guilty plea was involuntarily entered because the trial judge failed to inform him of certain consequences of his plea. Rule 11(c) of the Tennessee Rules of Criminal Procedure sets forth the advice that a criminal defendant in Tennessee must be given before a court may accept a guilty plea. According to the rule, the defendant must be advised of and understand (1) the nature of the charge to which he is pleading guilty to, the mandatory minimum punishment, and the possible maximum punishment; (2) his right to an attorney; (3) his right to a jury trial; (4) that he waives his right to a jury trial by pleading guilty; and (5) that any answers he gives during the plea colloquy may later be used against him in a prosecution for perjury or making a false statement.[6] Although it would be desirable for courts to inform criminal defendants of every possible consequence of their pleas, Rule 11 requires only that defendants be made aware of

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6 Tennessee case law also requires that a defendant be informed that "a different or additional punishment may result by reason of his prior convictions or other factors which may be established in the present action after entry of his plea." Tenn. R. Crim. P. 11, Committee Comments (quoting Mackey v. State, 553 S.W.2d 337, 341 (Tenn. 1977)).

those consequences listed in the Rule. See Fed. R. Crim. P. 11 advisory committee note.[7] The consequences listed in the Rule are generally referred to as the "direct" consequences of a plea, in contrast to "collateral" consequences, such as parole eligibility dates or possible deportation, of which a defendant need not be informed for his plea to be voluntary. See 1 C. Wright, Federal Practice and Procedure § 173 (1982).

The dicta in Hill that a state is not required to inform a criminal defendant of the date on which he will be eligible for parole is consistent with the holdings of the Sixth Circuit and other courts of appeal that a defendant need not be told of the collateral consequences of his plea in order for the plea to be voluntary. See, e.g., Berry v. Mintzes, 726 F.2d 1142, 1149-50 (6th Cir.), cert. denied, ___U.S.___, 104 S.Ct. 3520 (1984); Brown v. Perini, 718 F.2d 784, 788 (6th Cir. 1983). See also Downs-Morgan v. United States, 765 F.2d 1534, 1537 (11th Cir. 1985); United States v. Gavilan, 761 F.2d 226, 227-28 (5th Cir. 1985); United States v. Russell, 686 F.2d 35, 38-39 (D.C. Cir. 1982); United States v. Degand, 614 F.2d 176, 177 (8th Cir. 1980); Sanchez v. United States, 572 F.2d 210, 211 (9th Cir. 1977). The requirements of Rule 11(c) are consistent with these opinions.

Although the trial judge in this case did not inform petitioner that his conviction as a Class X felon would result in

[7] According to the Committee Comments, Rule 11 of the Tennessee Rules of Criminal Procedure is "substantially the same" as Rule 11 of the Federal Rules of Criminal Procedure. Tenn. R. Crim. P. 11 Committee Comments. As such, the federal rule's advisory committee note and cases interpreting the federal rule, although not binding, are persuasive.

his being ineligible for the various programs that could operate to shorten his sentence, this Court finds that such effects of a Class X felony conviction are collateral consequences of a guilty plea. Rule 11 and the cases cited above make it clear that the trial judge was not obligated to inform petitioner of such consequences. Accordingly, the guilty plea must be upheld unless the trial judge failed to adequately inform petitioner of the direct consequences enumerated in Rule 11. The following excerpts from the plea colloquy reveal that petitioner was informed of the direct consequences of his plea and indicated that he understood those consequences:

> (questioning of petitioner by his court-appointed attorney)
>
> Q ...Have I (attorney Glasgow) explained to you what the penalty is that the State is seeking in this case, that is the death penalty for first degree murder?
>
> A Yes.
>
> Q Have I explained to you that you've got a right to a trial by jury, and if you don't like what the jury does that you've got a right to appeal that? Do you understand that?
>
> A Yes.
>
> Q All right. You also understand that by entering this guilty plea that you will not have the right to appeal this case. Do you understand that?
>
> A Yes.
>
> . . .
>
> (questioning by trial judge)
>
> Q ...Mr. Glasgow has, as you've just indicated, I believe, he has either read the indictment to you, or he has explained to you what it is that you are accused of in the indictment, what the

indictment says that you are guilty of, so that you understand what it is that you are accused of here.

Is that correct?

A Yes, sir.

Q And he has explained to you your rights. You have just indicated that, I believe, but he has explained to you that you have the right to enter a plea of not guilty here if you are not guilty; you have the right to have a trial by jury, if you chose [sic] to do so, and if you had a jury trial then you could have any witnesses subpoenaed and brought in to testify on your behalf; you can have any other evidence brought in and introduced on your behalf, and then if the jury found you -- then the jury would determine whether or not you are guilty or innocent, and if the jury found you guilty of first degree murder, then the jury would fix your punishment according to law, either at life in the penitentiary or by death by electrocution.

Do you understand that?

A Yes, sir.

. . .

Q I am advised that you are going to enter a plea of guilty to murder in the second degree here. You have not been promised anything, or you have not been threatened in any way in order to get you to enter a plea of guilty, have you?

A No, sir.

Q This plea of guilty is being entered of your own free will. Is that correct?

A Yes, sir.

Q And because you are saying to me that you are guilty of this offense?

A Yes, sir.

Transcript (T) at 83-87. In light of the absence of any evidence that petitioner was not informed of the direct consequences of his guilty plea or that he did not understand those consequences, this Court finds that his guilty plea was voluntarily made. The

portion of his petition that alleges that his guilty plea was involuntary because the trial court failed to inform petitioner of all of the consequences of his plea is, therefore, without merit.

SUMMARY

In summary, this Court makes the following findings:

1. Under the two-part Strickland test for evaluating claims of ineffective assistance of counsel, petitioner has failed to show that his attorney's failure to advise him of certain collateral consequences of a Class X felony conviction constituted assistance of counsel that was not objectively reasonable.

2. Furthermore, it does not appear from the record in this case that the attorney's alleged failure to interview all significant witnesses, failure to request a severance, filing of only two pre-trial motions, and advice to petitioner that the evidence against him was overwhelming amounted to representation of petitioner that was below an objective standard of reasonableness.

3. Finally, neither the Constitution nor Tennessee law require a trial court to inform a criminal defendant of the consequences of being convicted as a Class X felon under Tennessee law.

As a result of these findings, this petition for habeas corpus does not state a constitutional claim for which federal relief is available and is, therefore, dismissed.

IT IS SO ORDERED.

James D. Todd

JAMES D. TODD,
UNITED STATES DISTRICT JUDGE

January 3, 1986

DATE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24
d. a copy must be served on all parties to the case that was given to the court or that was subpoenaed or ordered to be produced for its use;
e. if any party has a good faith objection to the confidential designation under this rule, the party shall give counsel for the party who made the designation notice of the objection and the parties shall follow the local rules of the district court governing discovery disputes;
f. if a party files a motion under Fed. R. Civ. P. 26(c) for a protective order with respect to particular [illegible] which is the subject of a pending motion to dismiss, the party shall, in addition to complying with the requirements of Fed. R. Civ. P. 26(c), set forth in the motion the circumstances which the party contends warrant the court's reconsideration of its prior ruling on the motion to dismiss;
g. a copy [illegible] or any portion thereof may be prominently displayed if the exhibit is required.

Exhibit 2- Appendix 14 b

No. 86-5198

FILED
MAY 21 1987
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRENTISS L. HOUSTON,

Petitioner-Appellant

v.

LARRY LACK, WARDEN, ET AL.,

Respondents-Appellees

ORDER

Before: JONES and RYAN, Circuit Judges, and CELEBREZZE, Senior Circuit Judge

This cause having come before the court upon the briefs of the parties, the record of district court proceedings, and the argument of counsel;

For the reasons stated in open court we have determined that the court is without jurisdiction to entertain the appeal. It is therefore

ORDERED that the case is hereby dismissed for want of jurisdiction; Rule 9(b)(1), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

Leonard Green
Chief Deputy Clerk

Exhibit 4 - Appendix 4

No. 86-5198

FILED
AUG 23 1988
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRENTISS L. HOUSTON,

Petitioner-Appellant,

v.

LARRY LACK, WARDEN, ET AL.,

Respondents-Appellees.

ORDER

BEFORE: JONES and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge

This matter is before the Court upon consideration of appellant's response to this Court's order to show cause why the appeal should not be dismissed for lack of jurisdiction because of a late filed notice of appeal.

Appellant in his supplemental response suggests that Fallen v. United States, 378 U.S. 139 (1964), requires a remand to the district court for a determination of excusable neglect. It appears that the appointment of counsel would be a substantial benefit to the appellant and to the Court. Appointed counsel is requested as one of the issues to be briefed, to brief the question of whether Fallen, supra, applies to the the instant appeal.

It is ORDERED that the jurisdictional issue be referred to the panel that will hear the case on the merits. It is further ORDERED that counsel be appointed to represent the appellant.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

87-5428

IN THE SUPREME COURT
FOR THE UNITED STATES OF AMERICA

PRENTISS HOUSTON	:	
Petitioner	:	
vs.	:	Case No. _____
LARRY LACK, Warden	:	
Respondent	:	

NOTICE OF APPEARANCE

To the Clerk:

Please enter the appearance of PENNY J. WHITE, Attorney at Law, 207 East Unaka Avenue, Johnson City, Tennessee 37601, telephone number 615 928-6005, not yet a member of this Court's bar, but licensed by the Tennessee Supreme Court since 1981 and appointed to represent the petitioner by the Sixth Circuit United States Court of Appeals, as attorney for petitioner on this Petition for Writ of Certiorari.

Respectfully Submitted,

Penny J. White

PENNY J. WHITE
Attorney at Law
207 East Unaka Avenue
Johnson City, TN 37601
615-928-6005

CERTIFICATE OF SERVICE

I hereby certify that I have mailed by first class mail postage prepaid to the Office of the Tennessee State Attorney General, James Robertson Parkway, Nashville, Tennessee, three copies as required by the Supreme Court Rules of the Petition for Writ of Certiorari, Motion to Proceed In Forma Pauperis, and Notice of Appearance in this case on this the 5th day of September, 1987.

Penny J. White
PENNY J. WHITE

OPPOSITION BRIEF

#V

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

(3)

NO. 87-5428

PRENTISS HOUSTON,

Petitioner,

v.

LARRY LACK,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

W. J. MICHAEL CODY
Attorney General & Reporter

GORDON W. SMITH
Assistant Attorney General
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(615) 741-6439
Counsel of Record

Counsel for Respondent

QUESTION PRESENTED FOR REVIEW

Does a United States Court of Appeals have jurisdiction of an appeal from the denial of a state prisoner's pro se petition for a writ of habeas corpus when the notice of appeal is delivered to prison authorities for mailing prior to the due date but arrives at the clerk's office one day after the due date?

OPINIONS BELOW

The opinions of the district court and court of appeals are attached to the petition as Exhibits 1 and 2.

JURISDICTION

The petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254. The judgment of the court of appeals was filed on May 22, 1987, and a petition for a rehearing en banc was denied on July 10, 1987.

STATEMENT OF THE CASE

The petitioner was convicted upon a plea of guilty in the Circuit Court of Obion County, Tennessee, of murder in the second degree and was sentenced to fifty (50) years in the state penitentiary. He subsequently attacked the conviction in a post-conviction proceeding in the trial court, alleging that his guilty plea had been involuntary and that he had received ineffective assistance of counsel. The trial court denied relief. The Court of Criminal Appeals affirmed the judgment and the Supreme Court of Tennessee denied review.

On May 11, 1985, the petitioner filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the district court. On January 7,1986, the district court entered a judgment denying the petition. The petitioner filed a notice of appeal on February 7, 1986. The court of appeals dismissed the appeal on May 22, 1987. A petition for a rehearing en banc was denied on July 10, 1987.

REASONS FOR DENYING THE WRIT

The respondent submits that the court of appeals correctly dismissed the appeal. The court of appeals did not render a decision in conflict with the decision of another court of appeals; nor decide a federal question in a way in conflict with a state court of last resort; nor so far depart from the accepted and unusual course of jujicial proceedings, nor so far sanction such a departure by a lower court, as to call for the exercise of this Court's power of supervision. See Supreme Court Rule 17.1(a). There being no special and important reasons for a grant of certiorari in this case, the Court in its sound discretion should deny the writ sought here.

ARGUMENT

THE COURT OF APPEALS PROPERLY DISMISSED THE PETITIONER'S APPEAL FOR LACK OF JURISDICTION.

The district court's judgment was entered on January 7, 1986. The petitioner's notice of appeal was filed on February 7, 1986, one (1) day late. Rules 4(a), 26(a), Fed. R. App. P. No extension was requested or granted by the district court. The notice of appeal requirement of Rule 4 is mandatory and jurisdictional. Browder v. Director, Dept. of Correction of Illinois, 434 U.S. 257, 264 (1978). The appeal, therefore, was properly dismissed for lack of jurisdiction.

The petitioner contends that his late-filed notice of appeal, filed within the excusable neglect extension period provided in Rule 4(a), should have been treated as a motion for an extension of time by the court of appeals. He cites United States v. Lucas, 597 F.2d 243 (10th Cir. 1979), and Moore v. Nelson, 611 F.2d 434 (2d Cir. 1979), as cases adopting that approach and in conflict with the court of appeals' holding in the instant case. However, both Lucas and Moore involved notices of appeal filed prior to the effective date of the 1979 amendments to the Federal Rules of Appellate Procedure, which changed Rule 4(a)(5) by specifically requiring that a motion for an extension of time to file a notice of appeal be filed not later than thirty days after the expiration of the original appeal time. Furthermore, Moore is factually distinguishable, a motion for extension of time for filing the notice of appeal having been filed within the thirty-day extension period.

The petitioner further alleges that he deposited his notice of appeal with the prison mail clerk prior to the due date and, therefore, he should have been excused from a timely filing of a notice of appeal under the rule in Fallen v. United States, 378 U.S. 139 (1964), because he had "done all that could reasonably be expected." However, none of the equitable considerations upon which the Court relied in Fallen are present here. Moreover, the record, silent as to the reason for the appellant's delay in depositing his notice of appeal for mailing, fails to show that this petitioner did all that could reasonably be expected in filing his notice of appeal.

CONCLUSION

Based upon these reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

W. J. MICHAEL CODY
Attorney General & Reporter

GORDON W. SMITH
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-6439

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class, U.S. Mail, postage prepaid, to Penny J. White, Attorney at Law, 207 East Unaka Avenue, Johnson City, Tennessee 37601, on this 18th day of November, 1987. I further certify that all parties have been served.

GORDON W. SMITH
Assistant Attorney General

Sworn to and subscribed before me
this 18th day of November, 1987.

NOTARY PUBLIC

My Commission Expires: 3/8/89